STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No. 129614

Plaintiff-Appellee,

Court of Appeals No. 260369

WILLIAM JERMICHAEL CARTER, Defendant-Appellant.

Kent County Circuit Court No. 99-004389-FC



PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

The People accept Defendant-Appellant's Statement of Appellate Jurisdiction.

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the trial court abuse its discretion in denying defendant's motion for relief from judgment on the grounds that defendant had failed to show good cause why the issues raised had not been presented in his direct appeals?

The trial Court answered "No."

The Court of Appeals answered "No."

Defendant-appellant answers "Yes."

Plaintiff-Appellee answers "No."

COUNTER-STATEMENT OF FACTS

On February 26, 1999, 17-year-old Stephanie Farquhar left her job at Woodland Mall around 10 p.m. to go home. She stopped at a red light at 29th Street and Breton Avenue in Kentwood; she waited until the light turned green, then carefully pulled out to make a left turn onto Breton. As she entered the intersection, a Blazer occupied by four intoxicated young men raced up Breton at a high rate of speed, blew through the red light without braking, and smashed into the side of Stephanie's car. Stephanie's leg, pelvis and ribs were broken, her skull was fractured, and her aorta was severed. She died instantly. (T VI: 59-60). Defendant was convicted of second-degree murder and with driving without a license.

The young men in the Blazer had begun their evening at Defendant's girlfriend's home. (T II: 90; T III: 42, 108). Everyone was drinking except Kamal Smith, and some of them were smoking marijuana. (T II: 92; T III: 43, 109-110; T IV: 29-30). They left that house to go to Defendant's sister's house, but decided to stop for more liquor first. They left in two vehicles; at that time, Defendant was driving a Camaro and Dominick Jones was driving the Blazer. (T II: 93; T III: 44, 110-111; T IV: 30). When they arrived at the liquor store Defendant struck another car. (T II: 94-95; T III: 45, 111; T IV: 31, 100).

Since Defendant and his friends were all underage, they found someone to go into the store and buy them more liquor. (T II: 96; T III: 46, 112; T IV: 31). When they left the liquor store, Defendant drove the Camaro to a gas station. When they pulled out of the gas station, Defendant again hit another car. He didn't stop, and the other car followed the Camaro apparently trying to get a license plate number. Defendant fled the other car at high speed, turning off his headlights although it was dark outside and sliding through two red lights. (T II: 97-99; T IV: 104-106; T V: 72-75).

The group ended up at Defendant's sister's house where they continued drinking, except for Kamal Smith who did not drink at all that night. The group became rowdy, and Defendant's sister's roommate told them to leave. They ignored her, so she threatened to call the police. The young men finally left, some in the Camaro and some in the Blazer. (T II: 67-71, 102-103; T III: 48-49, 114-115; T IV: 33-36).

Both vehicles ended up traveling northbound on Breton Avenue. The Camaro was in front of the Blazer when they approached 32nd Street, but the Camaro stopped because the traffic light at 32nd was red. The Blazer sped through the red light at 32nd fast enough to make the Camaro shake as it passed, nearly striking another car. (T II: 106-108; T III: 39-40, 117-118; T IV: 40, 114). Witnesses estimated the speed of the Blazer at anywhere from 50 to over 70 miles per hour. (T II: 36, 55; T III: 18, 54; T IV: 21, 42; T VI: 40). The Blazer continued through the traffic light at 29th street, which was also red, and without slowing or braking broadsided Stephanie's car as she entered the intersection. (T II: 37, 56; T III: 31, 33, 178, 189; T IV: 16, 47).

The primary issue at trial was the identity of the driver of the Blazer. Kamal Smith testified that Defendant was driving the blazer. (T II: 106). Dominick Jones testified that Defendant was driving the Blazer. (T III: 115-116). Robert Blakely testified that Defendant was driving the Blazer. (T IV: 38). Minutes after the collision, Ernesto McKinney called his mother, hysterical, and told her that he'd been in an accident and that Defendant was driving. (T III: 87-89). At trial Ernesto testified that he and Carl Palmer were in the back seat of the Blazer and that Robert Blakely was in the front passenger seat, but claimed he didn't know who got in the driver's seat. (T III: 50-53). However, he also testified that after the collision Defendant was in the Blazer, with his "butt" on the console between the front seats and the trunk of his body

leaning over behind the steering wheel. (T III: 62-65). Mildred Brown testified that when the group left Defendant's sister's home, Defendant and Ernesto went to the driver's side of the Blazer and Ernesto got in the back, but claimed that she "didn't remember" who got in the driver's seat. She was impeached with prior statements in which she identified Defendant as the driver. (T II: 73). Carl Palmer testified that Dominick Jones was driving the Blazer at the time of the collision; however, other witnesses testified that Dominick Jones was not even in the Blazer at that time, but was in the Camaro. (T II: 105; T III: 53, 117; T IV: 111, 140-141;).

Defendant's theory of the case was that Robert Blakely was driving the Blazer at the time of the collision. The only witness at trial who identified Blakely as the driver was Defendant's expert, who was not present at the time of the collision. The expert witness testified that he believed Blakely was the driver because in his opinion Blakely's injuries from the collision were consistent with Blakely being behind the wheel. (T VII: 24). Blakely had injuries to his face which the expert claimed were consistent with having been caused by the steering wheel, and an injury to his knee which the expert claimed was consistent with a two-inch-deep dent in the steel dashboard below the steering wheel. (T VI: 143; T VII: 19, 23-24).

The expert had not examined Blakely personally. The doctor who had examined Blakely testified that the abrasions on Blakely's face were more consistent with being caused by broken glass rather than a steering wheel, and that the injury to his knee consisted of "diffuse tenderness without any significant swelling." (T V: 9-10, 12-13, 17-18, 23-24). The knee injury was so mild that the doctor did not order X-rays or prescribe any treatment. (T V: 31).

The jurors apparently found the testimony of the *res gestae* witnesses and the physician who examined Robert Blakely to be more credible than the opinion of the defense expert. They found Defendant guilty of second degree murder and driving without a license. (T VII: 161-162).

Defendant was subsequently sentenced to 24 to 45 years in prison. The sentence was within the guidelines range. (Sent: 13). Defendant appealed his conviction and sentence of right. The Court of Appeals affirmed Defendant's convictions in an unpublished opinion issued on January 11, 2002. *People v Carter* (Docket No. 225049 1/11/02) (see attached). Defendant's application for leave to appeal was denied by the Michigan Supreme Court on September 30, 2002. Defendant filed a motion for reconsideration of the denial of leave which was denied by the Supreme Court on December 30, 2002.

Defendant subsequently filed a Motion for Relief from Judgment in the trial court pursuant to MCR 6.500 *et seq*. The motion was denied by the trial court in an opinion dated July 20, 2004 (see attached). Defendant then moved for reconsideration of the order denying his motion for relief from judgment. The trial court denied the motion for reconsideration in an opinion dated December 14, 2004 (see attached). The trial court expressly found that Defendant had failed to show good cause why the issues raised in his Motion for Relief from Judgment had not been raised on direct appeal, and consequently that Defendant was not entitled to relief pursuant to MCR 6.508(D)(3)(a).

Defendant sought leave to appeal the decision of the trial court to the Court of Appeals. The Court of Appeals denied leave "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." Order of the Court of Appeals, docket no. 260369, dated August 16, 2005.

Defendant now seeks leave to appeal from the trial court's denial of Defendant's Motion for Relief from Judgment.

ARGUMENT

STANDARD OF REVIEW

In his application for leave to appeal, Defendant extensively argues the merits of his claims of alleged error. Defendant's argument is misdirected in light of the procedural posture of this case. Defendant seeks review of the trial court's order denying Defendant's Motion for Relief from Judgment. While the trial court did, in the interests of completeness, address the merits of Defendant's claim of error, it is clear from the trial court's order dated July 20, 2004, that the trial court found that Defendant was not entitled to relief, regardless of the merits of his underlying claims of error, because Defendant had failed to show good cause for failing to raise these issues during his direct appeal. Opinion of the Circuit Court dated 7/20/04, p 7.

Motions for relief from Judgment are governed by MCR 6.500 et seq. MCR 6.508(D) sets forth the conditions under which a defendant is entitled to relief. That rule provides:

- **(D)** Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
- (1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
- (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
- (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
 - (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
 - (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

- (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
- (ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
- (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
- (iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.¹

The rule expressly provides that the trial court *may not* grant relief on grounds which could have been raised during the defendant's direct appeal, unless Defendant demonstrates good cause for not raising the issues at that time. The trial court found that Defendant had failed to demonstrate the "good cause" required by MCR 6.508(D)(3)(a). The Court of Appeals subsequently denied Defendant's Application for Leave to Appeal on the ground that Defendant had failed to meet the requirements of MCR 6.508(D).

It is this determination – that Defendant failed to establish good cause as required by MCR 6.508(D)(3)(a) – which is properly the focus of this Court's review. This Court reviews a denial of a motion for relief from judgment for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001). The issue properly before this Court is whether

¹ Defendant did not ask the trial court to waive the good cause requirement pursuant to this provision.

leave should be granted on the issue of whether the trial court abused its discretion in finding that Defendant had failed to meet the requirements of MCR 6.508(D)(3)(a). If the Court finds that the trial court properly exercised its discretion in denying Defendant's motion on procedural grounds, then Defendant is not entitled to relief regardless of any merit his underlying claims of error might have had if they had been raised on direct appeal.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT ON THE GROUNDS THAT DEFENDANT HAD FAILED TO SHOW GOOD CAUSE WHY THE ISSUES RAISED HAD NOT BEEN PRESENTED IN HIS DIRECT APPEALS.

Discussion: Defendant argued in the trial court that he was denied the effective assistance of appellate counsel, and that appellate counsel's ineffectiveness constituted good cause for failing to raise the issues on direct appeal. While ineffective assistance of appellate counsel may constitute good cause for failure to raise an issue on direct appeal, the defendant must meet the constitutional standards for ineffective assistance of counsel – he must rebut the strong presumption that appellate counsel met the general standard of competence guaranteed by the Sixth Amendment. *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995).

To show that defense counsel's representation was constitutionally deficient, the defendant must show that the attorney's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. Strickland v Washington, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); People v Pickens, 446 Mich 298; 521 NW2d 797 (1994). "[I]n order to establish that counsel was ineffective, defendant must show that but for counsel's error there is a reasonable probability that the result of the proceeding would have been different and that the result of the proceeding was fundamentally unfair or unreliable." People v Poole, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original).

The standards that apply to claims of ineffective assistance of trial counsel also apply to claims of ineffective assistance of appellate counsel. *People v Hurst*, 205 Mich App 634, 641;

517 NW2d 858 (1994). Appellate counsel's failure to raise every conceivable issue does not constitute ineffective assistance of counsel. Furthermore, it is presumed that counsel's decisions regarding which claims to pursue on appeal constitute sound appellate strategy. *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993).

In the present case, appellate counsel raised numerous issues on direct appeal, including issues of juror misconduct, an alleged violation of Defendant's right to counsel in connection with a line-up, prosecutorial misconduct, the admissibility of expert testimony, and denial of a request for a change of venue due to pretrial publicity. Had Defendant prevailed upon any of those issues, his conviction would have been reversed. Defendant asserts that appellate counsel's failure to raise the issue of the scoring of OV 3 constituted ineffective assistance because that issue would have been a "dead-bang" winner on appeal. Defendant's argument relies upon a liberal dose of hindsight, and it is axiomatic that the question of whether counsel was constitutionally ineffective must be decided from the perspective of the information available to counsel at the time, not on the bases of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant asserts that if counsel had raised the scoring issue on direct appeal, the case would have been remanded for resentencing. Defendant strongly implies that this would have been clearly and unequivocally required by established precedent at the time of Defendant's appeal. However, the only authorities he offers to support that assertion were decided long after Defendant's appeal had been concluded, and were not available to appellate counsel at the time of Defendant's appeal. The Court of Appeals did not consider the issue to have been clearly and definitively determined at the time of Defendant's appeal, as Defendant argues, as evidenced by the fact that in 2004, the Court of Appeals held in *People v Houston*, 261 Mich App 463, 472;

683 N.W.2d 192 (2004) (rev'd other grounds by *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005)), a published opinion, that remand for resentencing was not required on the grounds of a guidelines scoring error where the sentence actually imposed fell within the corrected guidelines range. Had the issue been clearly and definitively resolved at the time of Defendant's appeal, as he now suggests, the Court of Appeals would have been constrained to follow that precedent. MCR 7.215(J).

While the holding of the Court of Appeals in *Houston* has been abrogated by this Court's recent decision in *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006), Defendant's counsel on direct appeal cannot be found ineffective on the grounds that he failed to anticipate that holding. At the time of Defendant's appeal, the case law did *not* clearly establish that a scoring error which affects the guidelines range mandates resentencing even where the actual sentence falls within the corrected range.² Consequently, the issue was not the "dead-bang" winner portrayed by Defendant.

In order to establish that appellate counsel was constitutionally ineffective, Defendant must show that appellate counsel made an error so egregious that he was not functioning as the "counsel" guaranteed by the Constitution, and that there is a reasonable likelihood that the outcome of the proceeding would have been different absent the alleged error. Strickland, supra. Defendant has failed to show more than a speculative possibility that the case might have been remanded for resentencing had appellate counsel raised the scoring issue; the People submit that this is not sufficient to meet Defendant's burden on the issue of prejudice. Moreover, Defendant

² The People would note that even this Court's holding in *Francisco* does not mandate *automatic* remand for resentencing in every case.

has failed to show any reasonable likelihood that the trial court would have imposed a different sentence even if resentencing had been ordered.

Defendant argued at sentencing that he should be given a sentence similar to the 17-year minimum sentences given to other individuals convicted of second-degree murder. Defendant argues on appeal that the only reason the trial judge gave Defendant a minimum sentence longer than 17 years is because the guidelines required it. That argument is not supported by the record. Had the trial court felt that a sentence as close to 17 years as permitted by the guidelines was appropriate, he would have sentenced Defendant at the bottom of the guidelines range as calculated at sentencing. He did not. While the trial court acknowledged the effect of the statutory guidelines and stated an intent to abide by those guidelines, he went on to discuss at length numerous factors which he found to be relevant to the determination of the specific sentence to be imposed on Defendant. Sentence Transcript, pp 7-9. Reading the transcript as a whole, it is clear that the judge determined Defendant's specific minimum sentence on the basis of the individual facts of the offense and the offender – precisely the duty of a judge in imposing sentence. This is not a case where a trial judge stated on the record that a sentence at the low end of the guidelines range was warranted. Trial judges can and do make such statements when their sentencing decisions are based on those considerations. In the present case, the record reflects that the trial court chose to tailor its sentence on the basis of the specific facts of the offense and the offender, not on the basis of where in the guidelines range the sentence would fall.

This issue was not raised at the time of sentencing. It was not raised on direct appeal. It is raised for the first time in the context of a Motion for Relief from Judgment. In *People v Carpentier*, 446 Mich 19, 42; 521 NW2d 195 (1994), Justice Riley (concurring) eloquently described the scope of review in a motion for relief from judgment:

The circumstances under which a defendant may appeal under MCR 6.508(D) are narrowly limited when the defendant has already utilized the full gamut of the appellate process and is found wanting. Without such restrictions, the finality of judgments would be effectively undermined. The appellate process is not a game in which defendants should be afforded unlimited and unrestricted opportunities to attack convictions and sentences that were duly imposed years before. Once a defendant has been granted his day in court and his appeal by right, only under the most egregious circumstances should he be permitted to again attack the integrity of his conviction or sentence. The people are entitled to presume that he stands fairly and finally convicted. The elaborate, detailed, and careful appellate procedures that have evolved over 150 years of experience to ensure the fair and just treatment of criminal defendants should be discarded only with extreme reluctance.

To obtain any relief at this stage of the proceedings, nearly seven years after Defendant was found guilty by a jury and sentence imposed, the burden is on Defendant to demonstrate that he is entitled to relief. MCR 6.508(D). To meet that burden, Defendant must demonstrate good cause for failing to raise this issue on direct appeal. Defendant has asserted ineffective assistance of appellate counsel as the "good cause" required by MCR 6.508(D)(3)(a). The burden is therefore on Defendant to establish that alleged ineffective assistance. In order to do so, Defendant must demonstrate that he was prejudiced by appellate counsel's failure to raise this issue on direct appeal. To demonstrate prejudice, he must show that the outcome would likely have been different had the issue been raised on appeal. In order to achieve a different outcome, the case would have had to be remanded for resentencing by the Court of Appeals, and the trial judge would have had to impose a different sentence in light of the corrected guidelines.

MCR 6.508 sets a high bar for relief; it is a mechanism of last resort for those rare cases in which egregious error has somehow escaped the myriad procedural safeguards of trial and direct appeal, to be employed only where the defendant can show good cause for raising the allegedly egregious error for the first time only after the conclusion of the direct appeal, years after the conclusion of the trial. In this context, a mere speculative possibility that the alleged

error *might* have made a difference in the sentence imposed by the trial court should not be considered sufficient to meet that burden. Defendant should be required to make an affirmative showing, based on record evidence, that a change in the guidelines range would likely have made a difference in the sentence imposed by the trial court. A statement by the judge that "a sentence at the low end of the guidelines is warranted in this case" might be sufficient to constitute such a showing; the mere fact that the trial court in the present case acknowledged the existence of the guidelines and an intent to sentence within them is not.

Even in the context of a direct appeal, the Legislature had mandated and this Court has repeatedly held that

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. [MCL 769.26, emphasis added.]

See also, e.g., People v Lukity, 460 Mich 484; 596 NW2d 607 (1999). To justify undermining the validity of a homicide sentence years after the sentence is imposed, the defendant should be held to a higher standard than the "affirmatively appears" standard applicable to preserved error in direct appeals. MCR 6.508 states unequivocally that the burden of establishing entitlement to relief in the context of a motion for relief from judgment is on the defendant. The rule does not specify the degree of proof required to meet that burden. Where the issue is whether or not a scoring error which affects the guidelines range would have changed the actual sentence imposed by the trial court, the People submit that the nature of these post-conviction proceedings and the public's strong interest in the finality of sentences would be appropriately served by requiring

that Defendant show clear and convincing evidence that the sentence would have been different had the scoring error been corrected in a timely fashion.

Even applying the relatively more liberal standard of the harmless error statute, it does not "affirmatively appear" from the record of the sentencing hearing that the trial court would have imposed a different sentence had the scoring of OV3 been corrected. Defendant has failed to show a reasonable likelihood that the outcome would have been different if the scoring issue had been raised on direct appeal. Defendant has therefore failed to show that he was denied the effective assistance of appellate counsel. In the absence of a showing of ineffective assistance, Defendant has not demonstrated good cause for failing to raise these issues on direct appeal, and Defendant is therefore not entitled to relief under MCR 6.508(D)(3)(a). The trial court did not abuse its discretion by denying the motion for relief from judgment on the grounds that Defendant had failed to meet the requirements of that rule. This Court should deny Defendant's application for leave to appeal without further analysis.

This court has asked the parties to address the question of whether the determination that a scoring error would not have affected the sentence imposed may be made in response to a post-conviction challenge to the sentence, or whether that determination must be made at the time of sentencing. The People submit that this Court need not reach that issue in the present case because, for the reasons discussed above, Defendant has failed to meet the procedural requirements of the rules governing motions for relief from judgment. Alternatively, this Court need not reach the issue because Judge Soet's explanation of the reasons for his sentencing decision articulated on the record at the time of sentencing are sufficient to rebut Defendant's claims in this context, where the burden is upon Defendant to show entitlement to relief. In light of the clear mandate of this Court's order, however, the People will address that issue

In those few cases in which a defendant actually raises a scoring issue at the time of sentencing, and alleges error in the scoring of only one variable, it would be realistic to expect the judge to evaluate the effect on the guidelines range if the variable was scored as the defendant requests, and to determine whether the judge would impose the same sentence under that alternative scoring. Even where scoring issues are raised at the sentencing hearing, however, the defendant frequently challenges the scoring of more than one variable. How may a trial judge protect the finality of his or her sentence in such circumstances? Must the judge consider every possible combination of scoring changes – if OV 1 is changed but OV 2 and OV 3 are not, would it change the sentence? What if OV 1 and OV 2 are changed but OV 3 is not? What if Must the judge evaluate each possible permutation of scoring changes and determine whether each particular combination would affect the sentence imposed?

The trial judge cannot reasonably determine whether a change in the scoring of a guidelines variable would affect the sentence imposed until he or she is presented with a specific alternative scoring to evaluate. While in some cases that may occur at the initial sentencing hearing – where, as noted above, the defendant challenges the scoring of only one variable – more often the first time the judge will be presented with the opportunity make that determination will be after the fact, in some post-sentencing proceeding. To grant a full resentencing in every case where a post-sentencing review determines that a scoring error occurred which affected the guidelines range, without giving the trial court an opportunity to evaluate the impact of the change on the sentence imposed, would frequently "engage the trial court in the futile exercise of marching up the sentencing hill again, only to hand out the same sentence and march back down again." *People v Ristich*, 169 Mich App. 754, 759; 426 NW2d 801 (1988). While trial judges should certainly be encouraged to consider whether a proposed

change in the guidelines range would affect their sentencing decision when a specific alternative range is presented at the time of sentencing, to preclude them from making that evaluation when confronted with the issue in a post-sentencing proceeding would unreasonably undermine the finality of sentences.

The grant of a full resentencing entails the investment of substantial resources; more significantly, it may have a profoundly traumatic effect on the victims and their families. In the present case, Defendant was sentenced for the murder of a young woman whose only fault was driving home from her job at a time when Defendant and his buddies were racing around town in their cars, drunk, even after getting into other accidents earlier in the evening. Now, over seven years after Stephanie Farquhar died as the result of Defendant's conduct, he proposes that Stephanie's family, who one hopes would have come to terms with her death and moved on with their lives, be forced to re-confront the trauma of her loss and repeat the painful process of appearing in court to try to communicate the effect of Stephanie's death to the judge at a sentencing hearing. The People concede that where error has occurred which truly resulted in the defendant receiving a higher sentence than would have been imposed absent the error, concern for the victims and their families must yield. But where it does not "affirmatively appear" from the record that the trial judge would have imposed a different sentence in light of the corrected guidelines range, and where the successor judge who would be responsible for conducting a

³ MCL 769.26. As discussed above, the People submit that in the context of a motion for relief from judgment, the defendant should be required to make a stronger showing of prejudice than the "affirmatively appears" requirement applicable to preserved claims of error raised on direct appeal.

resentencing hearing has already reviewed he facts of the case and the transcripts of the trial⁴ and concluded that he would impose the same sentence, remand for a full resentencing would serve no purpose which would justify the commitment of resources involved and the anguish to the victim's family that would result.

Defendant in his brief expounds at some length on the importance of the right to allocution at a resentencing. Certainly if resentencing is granted, Defendant will be given an opportunity for allocution. But Defendant's argument begs the question of whether resentencing is justified at all on the facts of this case. For the reasons discussed above, a resentencing is not warranted on the facts of this case. The People submit that Defendant's Application for Leave to Appeal to this Court should be denied. Should the Court find that leave should be granted, the People would ask the Court to specifically consider the issue of what showing a defendant must make in order to justify sentencing relief in a motion brought pursuant to MCR 6.500 et seq.

⁴ Order and Opinion of Judge Redford dated July 20, 2004.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that Defendant's Application for Leave to Appeal be DENIED.

Respectfully submitted,

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Dated: July 21, 2006

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